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SEP 30 1996

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

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September 30, 1996

Mr. William F. Caton  
Secretary  
Federal Communications Commission  
Room 222  
1919 M Street, N.W.  
Washington, D.C. 20554

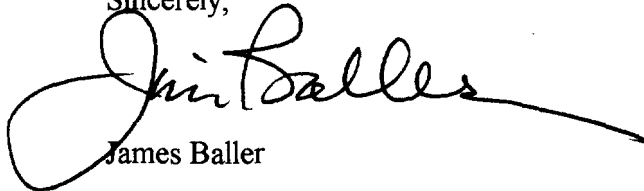
Re: Petition for Clarification or Reconsideration of the Commission's  
First Report and Order on Implementation of the Local Competition  
Provisions of the Telecommunications Act of 1996  
CC Docket Number 96-98

Dear Secretary Caton:

Pursuant to Rule 1.429, I enclose an original and eleven copies of the American Public Power Association's petition for clarification or reconsideration of a portion of the Commission's First Report and Order in the proceeding identified above.

Kindly return an original date-stamped copy to the messenger.

Sincerely,

  
James Baller

cc: International Transcription Service

No. of Copies rec'd 0211  
LATA B C D E

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

**RECEIVED**

**SEP 30 1996**

**FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY**

In the Matter of:

Implementation of the Local  
Competition Provisions of the  
Telecommunications Act of 1996

CC Docket No. 96-98

To the Commission:

**PETITION OF THE  
AMERICAN PUBLIC POWER ASSOCIATION  
FOR CLARIFICATION OR RECONSIDERATION OF  
THE COMMISSION'S FIRST REPORT AND ORDER**

Pursuant to Section 1.429 of the Rules of the Federal Communications Commission, the American Public Power Association ("APPA") hereby petitions the Commission for clarification or reconsideration of the portion of its First Report and Order on local competition that addresses the definitions of "telecommunications services" and "telecommunications carriers." First Report and Order ¶¶ 993-94, as released August 8, 1996, and corrected on August 20, 1996.<sup>1</sup> For the most part, the Commission's discussion of these definitions is consistent with the Act and its legislative history and would promote competition by encouraging consumer-owned electric utilities to make telecommunications infrastructure and facilities available to prospective providers of telecommunications services. One parenthetical sentence, however, contains an ambiguity that could adversely affect consumer-owned electric utilities in ways that the Commission does not appear to have intended. APPA urges the Commission to remove or clarify that sentence.

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<sup>1</sup> Hereafter, APPA will cite the Commission's official summary of the First Report and Order in 61 Fed. Reg. 45,475 (August 29, 1996) ("Summary of First Report and Order").

## **Interest of APPA**

APPA is the national service organization for approximately 2000 consumer-owned electric utilities throughout the Nation, located in every state except Hawaii. For more than a century, consumer-owned electric utilities have played a vital role in furnishing essential local competition in the electric power industry. They are now well-situated to play a similar role in the field of telecommunications.

Over the next few years, hundreds of consumer-owned electric utilities will need to upgrade their telecommunications infrastructure to support their core business of providing electric service at ever increasing levels of efficiency and reliability. The sophisticated telecommunications infrastructure that these utilities will need for their own purposes can support the provision of video, voice, data and other interactive telecommunications services by the electric utilities themselves or by other providers of such services.

By encouraging consumer-owned electric utilities to make their facilities available for these purposes, the Commission can simultaneously accelerate the pace of deployment of the National Information Infrastructure, promote competition, ensure universal service, and minimize wasteful, costly and duplicative burdens on streets, poles, ducts, conduits and rights of way. The Commission can also help preserve essential competition among consumer-owned and privately-owned providers of electric service.

APPA has participated in various rulemakings to implement the Telecommunications Act in order to help the Commission understand how its decisions may affect APPA's members and to encourage the Commission to take actions that would give consumer-owned electric utilities a full and fair opportunity to provide or facilitate the provision of telecommunications services. APPA is filing this petition in furtherance of these objectives.

## Discussion

Under Section 3(49) of the Act, the term “telecommunications carrier” means “any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226).” Section 3(51), in turn, defines “telecommunications service” as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.” The key operative terms are “for a fee” and “directly to the public.” By using these terms at the urging of utilities, Congress reflected its intent to exclude at least the following categories of services from the Act: a utility’s own internal usage of its telecommunications facilities; a utility’s provision of telecommunications support to other instrumentalities of government; a utility’s provision of telecommunications on a private-carriage basis, as distinguished from a common-carriage basis; and a utility’s provision of telecommunications infrastructure -- such as “dark fiber” or wholesale capacity -- to persons who are themselves in the business of furnishing telecommunications services for a fee directly to the public.<sup>2</sup>

In its First Report and Order, the Commission finds that

A “telecommunications carrier” is defined [in the Act] as “any provider of telecommunications services . . . . A telecommunications carrier shall be treated as a common carrier under the Act “only to the extent that it is engaged in providing telecommunications services” . . . . A “telecommunications service” is defined as “the offering of telecommunications for a fee directly to the public or to such classes of users as to be as to be effectively available to the public. *We conclude that to the extent a carrier is engaged in providing for a fee domestic or international*

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<sup>2</sup> The legislative history of the nearly identical definition of “telecommunications service” in S.1822 in the prior Congress indicates that Congress did not intend the Act to apply to “the offering of telecommunications facilities for lease or resale by others for the provision of telecommunications services.” S. Rep. No. 103-367, 103d Cong., 2d Sess. (September 14, 1994). In fact, Congress expressly stated that “[t]he offering by an electric utility of bulk fiber optic capacity (i.e., ‘dark fiber’) does not fall within the definition of telecommunications service.” *Id.*

*telecommunications, directly to the public or to such classes of users as to be effectively available to the public, the carrier falls within the definition of "telecommunications carrier."*

Summary of First Report and Order ¶ 658, 61 Fed. Reg. at 45,572 (emphasis added). This definition, the Commission notes, "is consistent with the 1996 Act, and there is nothing in the record in this proceeding that suggests that this definition should not be adopted. *Id.*

The Commission then illustrates the application of these definitions with the following examples:

We conclude that cost-sharing for the construction and operation of private telecommunications networks is not within the definition of "telecommunications services" and thus such operators of private networks are not subject to the requirements of section 251(a). We believe that such methods of cost-sharing do not equate to a "fee directly to the public" under the definition of "telecommunications service." Conversely, to the extent an operator of a private telecommunications network is offering "telecommunications" (the term "telecommunications" means "the transmission, between or among points specified by the user, of information of the user's choosing, without change in form or content of the information as sent and received" 47 U.S.C. § 153(43)) for a fee directly to the public or to such classes of users as to be effectively available directly to the public (*i.e.*, providing a telecommunications service), the operator is a telecommunications carrier and is subject to the duties in section 251(a).

Summary of First Report and Order ¶ 660, 61 Fed. Reg. at 45,573.

The Commission's conclusions, findings and examples indicate that, to be deemed a "telecommunications carrier," a person must *both* charge "a fee directly to the public or to such classes of users as to be available directly to the public" *and* provide domestic or international "telecommunications," as defined in the Act. APPA agrees with these definitions and with the Commission's determination that both the Act and the record in this proceeding support them.

The Commission's discussion quoted above is simple, straightforward and unambiguous. Unfortunately, the First Report and Order concludes this discussion with a sentence that could lend itself to misinterpretation:

Providing to the public telecommunications (e.g., selling excess capacity on private fiber or wireless networks), constitutes a telecommunications service and thus subjects the operator to the duties of section 251(a) to that extent.

Summary of First Report and Order ¶ 660, 61 Fed. Reg. at 45,573. On the one hand, this sentence can be interpreted to mean that the term “telecommunications service” includes the use of excess capacity on private fiber or wireless networks *if* the user sells “telecommunications,” as defined in the Act, “for a fee directly to the public or to such classes of users as to be as to be effectively available to the public.” Such an interpretation would be consistent with the Act and would cause no substantive problems. On the other hand, the sentence can be interpreted to mean that “selling excess capacity on private or wireless networks,” without more, can be sufficient to meet the definitions of “telecommunications” or “telecommunications service” in the Act. Not only would that interpretation be contrary to the Act -- e.g., by failing to account for the essential statutory element of transfer of information without change -- but it would also be counterproductive. By discouraging electric utilities from making telecommunications infrastructure and facilities available to third parties that would, in turn, provide “telecommunications service” for a fee directly to the public, the end result would be less local competition, higher prices and greater burdens on streets, poles, attachments, and rights of way.

Given the language and legislative history of the Act and the Commission’s own analysis preceding the sentence quoted above, APPA does not believe that the Commission intended the latter interpretation of that sentence. APPA urges the Commission to make this clear, as incumbent providers of telecommunications services are likely to use any and all ambiguities in the Commission’s orders to hinder or delay competition at the local level.

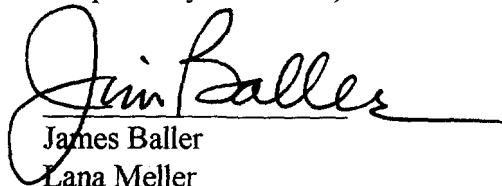
Alternatively, if the Commission did intend that interpretation, then APPA urges the Commission to reconsider its position. Although consumer-owned electric utilities have vast

potential as providers or facilitators of telecommunications service, they are subject to intense public scrutiny and local control, which has historically served as a forceful and effective alternative to federal and state regulation. Local control over major policy decisions is particularly important to communities that support publicly-owned electric utilities because these communities bear the entire financial risk of failure.

In these circumstances, regulation by a distant authority, which would follow from classifying a consumer-owned electric utility as "telecommunications carrier," or even the perception that the nature and scope of such regulation is uncertain and could ultimately diminish local control, could cause many local governments to deny or delay approval of their electric utility's involvement in telecommunications activities. Any such fears, moreover, would surely be reinforced by well-financed incumbent and potential telecommunications service providers.

APPA submits that the Commission should do everything possible to encourage consumer-owned electric utilities to become active participants in bringing competition to the emerging field of telecommunications. Granting this petition would be a small but important step in that direction.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jim Baller", with a long horizontal line extending to the right.

James Baller

Lana Meller

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